

The case against Russia for the attack on flight MH17

According to the news, a new legal proceeding has been initiated against Russia and its president Vladimir Putin for the downing of the Malaysia Airlines flight MH17 in the airspace of Ukraine on 17 July 2014. The present analysis examines the outlines of the case.

May 27, 2016

The Boeing 777 passenger airplane flying from Amsterdam to Kuala Lumpur was hit by a missile over the conflict-torn Donetsk region; the explosion and the immediate crash of the airplane killed all of the 298 persons (283 passengers and 15 personnel) on board. The victims of the attack represented several nations: the majority of the victims were Dutch, but there were also passengers from Malaysia, Australia and New Zealand. It is thus no wonder that the incident has provoked an international outcry and strong criticism.

Responsibility for the attack

The responsibility for the attack has been seriously debated and is still under investigation. Western European states, the United States and Ukraine have constantly stated that the Russian-backed rebels active in the region are responsible for the incident, as they employ weapon systems capable of causing such a disaster, which are provided to them by Russia. This statement has been backed up by data from [intelligence sources](#) as well. On the other hand, Russia blames Ukrainian state forces for the accident, as they use similar weapons.

The question has reached the highest level of international politics: [after some debate](#), during which Russia had argued for a softening of the text regarding the events, the United Nations Security Council adopted [Resolution 2166](#) on 21 July 2014. The text of the resolution expressed support for the “efforts to establish a full, thorough and independent international investigation into the incident in accordance with international civil aviation guidelines” and called upon the international community to assist the investigations.

The technical investigations, conducted by the [Dutch Safety Board \(DSB\)](#), have identified the warhead in October 2015 as a 9N314M missile from a Russian-made Buk missile system (a mobile, radar-guided surface-to-air missile) based on the shrapnel found in the debris, but have left the question of the location of the launch of the incoming missile open. By using various simulations, the DSB has been able to determine an approximately 320-square-mile area as the place of the launch, but not to point out an exact location, and it also found that the investigation actually lies outside the scope of its mandate. What is sure is that this type of missile is employed by both Russian and Ukrainian ground-based

air defence forces, and also by numerous other states. At the same time, from the fact that hundreds of pieces of metal shrapnel were found in the dead bodies of the pilot and the co-pilot of the airplane, one can deduce that the explosion must have occurred in front of the airplane, which is typical for surface-to-air missiles, making [earlier Russian allegations](#) of a Ukrainian SU 25 Frogfoot airplane shooting the airplane very unlikely, while the possibility of an impact of an air-to-air missile has been excluded by the DSB investigations as well.

Just recently, in May 2016, a British investigative website has [managed to bring forth some convincing evidence](#) to prove that the launcher unit belongs to the Russian air forces by using recently published photographs of various Buk units used by the 53rd Brigade based in Kursk, Russia. At the same time, [Stratfor has published a report](#) revealing convincing data about the location of the Buk unit that was probably responsible for the incident.

The examination of the criminal responsibility for the tragedy

As most of the victims were Dutch, a separate criminal investigation has also been initiated by the Dutch authorities, with international participation by four other states: Australia, Belgium, Malaysia and Ukraine. The so-called Joint Investigation Team (JIT) has concluded that for the establishment of criminal responsibility, Russian cooperation would be needed.

In this case, criminal responsibility of individuals can be based on an intentional attack on the passenger airplane, as this would constitute a war crime, a grave breach of the rules of law of war embodied in the [Geneva Conventions and their additional protocols](#) applicable to armed conflicts, which can be international or non-international in their character. The situation is similar in case of a non-intentional attack on the passenger airplane, meaning, for example, that the attacker acted negligently, believing that the attacked airplane was a legitimate military target, but either being negligent in the verification of the true nature of the object or completely ignoring this obligation. Based on the evidence gathered so far, the latter seems to be a very likely scenario in this case, but to be able to decide on this, especially on the person responsible, more factual evidence is needed. That is where Russian cooperation becomes crucial, as Russia probably has access to the equipment or even the personnel involved in the incident, but the state officially denies any involvement.

The idea of creating an international criminal tribunal has also been raised with the goal of prosecuting those who are responsible for the tragedy, but the idea has proven to be naive. In June 2015, Russia has rejected the proposal for such a UN tribunal, and when Malaysia, an elected member of the UN Security Council at that time, proposed a resolution about it (together with Australia, Belgium, the Netherlands, and Ukraine), Russia initially circulated a draft counter-resolution with strong criticism towards the international investigation, and then [finally it vetoed the proposal](#). With this, the criminal investigations have reached an impasse for the time being.

A possible legal claim for the case in front of the European Court of Human Rights

The [European Court of Human Rights](#) may examine individual complaints against a member state of the Council of Europe in case of its violation of any human right recognized by the [European Convention of Human Rights](#), the fundamental human rights treaty of the European continent, adopted in 1950. The result of the proceedings before the Court may lead to financial compensation at most, however, since the Court does not have any power to employ criminal punishments. In the present case, the claim by the applicants is 10 million Australian dollars for each victim, but the Court may set any amount that it feels to be “just satisfaction”, regardless of the amount set by the applicants.

A vague point in the claim is that [it names both Russia as a state and Vladimir Putin as respondents](#), but the latter point can hardly be taken seriously. As the Court may only examine the responsibility of states, not individuals, the mentioning of the Russian president is probably only PR in its nature.

In this case, the claim to the Court can be based on a violation of the right to life, according to Article 2 of the Convention. According to the Court's current practice concerning this human right, the Court can generally find states responsible for its violation in two cases: either they directly cause the death or they fail to properly investigate or punish the loss of life of the deceased individual. Evaluation of the proof for any of the above will take place in the Court after the deciding about the admissibility of the case.

Russia can be found responsible for a violation of the Convention, both for the downing of the airplane (if the missile launcher had belonged to Russia, if it had been manned by Russian personnel, or if Russia had control over separatist groups responsible for the launch) and for trying to block the investigation, if the Court proves that this was the case. In regard to the violation of the right to life, there is one possible defense on the side of the one launching the missile: the Convention accepts fatalities and does not find them to be violations in wartime if they are caused by "lawful acts of war", but it would have required a formal derogation earlier, and it also seems hardly arguable to qualify the attack against the passenger airplane as such an action. While the tragedy occurred in the Ukrainian airspace, the Court has developed its practice regarding the extraterritorial application of the Convention, and the facts of this case – if proven – seem to satisfy the requirements of that practice. The claim is not directed against Ukraine, but in my opinion there may be possible arguments for its partial responsibility for not closing the part of its airspace over the conflict zone.

The Court has to make a decision now about the case being admissible or not before any examination of the merits. With the current backlog of cases, though, even a year may pass, unfortunately, before the Court decides on this. I am not sure if priority will be granted to this case, as there is no imminent physical or other danger to the applicant in connection with it.

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